Office Supreme Court, U.S.
FILED
MAY 9 1961
JAMES R. BROWNING, Clerk

No. 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

FONG FOO AND ROBERT KNUPP,

Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The absence of action by the Court on the petition for certiorari herein indicates that the Court may have adopted the suggestion, made in the Government's Brief in Opposition (p. 16), that the Court "hold this petition pending the outcome of the *Gori* case." We do not quarrel with such action since, as we noted in our petition, a reversal in *Gori* will necessarily require a reversal in this case.

The Court's apparent decision to decide the *Gori* case before deciding this one, however, raises the question of how the present case should be disposed of in the event *Gori* is affirmed. As we pointed out in our petition, an affirmance in *Gori* would certainly not mean that the result in the present case should also be affirmed, since there are issues raised here which are not present in *Gori*.

At the time we filed our petition for certiorari, we did not

know what arguments the Government would advance in *Gori*. Having now read the Government's brief and heard the Government's oral argument in that case, we are persuaded that an **affirmance** in *Gori* on the grounds urged by the Government would require a **reversal** in this case. We would like, therefore, to take this opportunity to examine the Government's argument in *Gori* as it relates to the present case.

The starting point of the Government's argument in *Gori* is that the modern concept of double jeopardy "represents an amalgam of two distinct ideas having different origins and history." (p. 5) The first of these is the ancient common law principle that a defendant who had once been convicted or acquitted could not be tried again. The second is the equally ancient but now obsolete doctrine that once a jury was impanelled in a criminal case it could not be discharged until it reached a verdict. This second principle, the Government contends, was not designed to protect the defendant, but was based on the mystical motion that the particular jury selected to hear the particular case was divinely endowed with ability to reach a correct verdict.

The Government argues that the first principle is still "a rigid and absolute command," but that the second principle, which was modified long ago, should now be replaced by a flexible approach, under which a jury can be discharged in the discretion of the trial judge, and a defendant tried again, unless in all the circumstances it would be "oppressive" to subject him to another trial. On this basis, the Government contends that the second trial of *Gori* was proper, and did not violate his constitutional rights.

In short, the Government bases its entire argument in *Gori* on the fact that Gori was not acquitted at the first trial. But the defendants in the present case *were* acquitted. It seems to follow, therefore, that if the Government is sustained in *Gori,* the decision below in the present case should be reversed.

That the distinction between a second trial after a mistrial and a second trial after an acquittal is the entire basis of the Government's position in *Gori* can best be demonstrated by quoting some excerpts from the Government's brief on the merits in that case. On page 9, at the very beginning of its argument, the Government states:

> "There was no adjudication on the merits, and the trial judge did not purport to find the imagined misconduct so serious as to justify a judgment of acquittal. Yet petitioner insists on the right which would flow from a valid judgment of acquittal—the right not to be tried again for the same offense."

This statement implicitly concedes that if the judge had "purported" to find the "imagined misconduct" of the prosecutor serious enough to justify an acquittal, then Gori could not be tried again. That, of course, is precisely what happened in the present case.

After reviewing the history of double jeopardy at common law and in the various states, the Government concludes that "the plea of a previous but uncompleted trial, unlike the pleas of *autrefois acquit* or *convict,* was never deemed an absolute bar to a second trial." (p. 20) In the present case, of course, a plea of *autrefois acquit* would be available to the defendants on a second trial, and it follows from the Government's argument that this plea would be "an absolute bar."

In discussing the case of *United States* v. *Perez,* 9 Wheat. 579, upon which the petitioner in *Gori* relies, the Government argues:

> "The *Perez* opinion seems clearly to have adopted what later became the English view that, while as a matter of practice the power to order a discharge ought to be sparingly exercised, even an erroneous discharge would not operate to bar a second trial, for so long as the defendant 'has not been convicted or acquitted,' he 'may again be put upon his defence.' " (p. 21)

Here again, the plain implication is that a defendant who *has* been acquitted cannot "again be put upon his defence."

In the section of its brief entitled "the conclusions to be drawn from the historical development," the Government summarizes its position as follows:

> "The meaning that has been given to the double jeopardy clause can best be explained, we think by recognizing that the clause is not monolithic but embodies a variety of prohibitions. Its first, and historically most unquestionable, meaning is to give constitutional status to the common pleas of *autrefois acquit* and *autrefois convict*, and **in that meaning, no doubt, it is a rigid and absolute command.** In its application to mistrials, however, the historical antecedent is quite different. . . . In short, **however absolute the Fifth Amendment may be in the prohibition of a second trial after acquittal** or conviction, its qualified prohibition of mistrials is of a very different order and expresses, not a technical rule, but a basic requirement of fairness and a broad protection against oppression not readily confined within a verbal formula." (pp. 26-7, emphasis added.)

We are not persuaded that this distinction is as important as the Government claims. We agree with the petitioner in *Gori* that the protection against double jeopardy precludes a second trial even if the first trial was terminated without either an acquittal or conviction, so long as the termination was without the defendant's consent or without any manifest necessity. But we fully agree with the Government that the constitutional prohibition against a second trial after an acquittal is a "rigid and absolute command."

There is yet another sense in which the Government's argument in *Gori* would, if sustained, require a reversal in the present case. In answer to the petitioner's argument in *Gori* that a new trial is permissible only if the first one was ter-

minated on the defendant's motion or for reasons of manifest necessity, the Government argues that this rule would "effectively eliminate the judge's right to control the conduct of the proceedings." (p. 37) The Government points out that the trial judge has always been vested with a broad power and responsibility to take such action as is necessary to assure to a criminal defendant a fair trial. If the unavoidable result of granting a mistrial when circumstances make the continuation of the trial unfair would be to preclude a second trial, the Government contends, the trial judge may often be inclined to lean over backward in favor of the prosecution.

It is no answer, the Government says, to assert that the defendant can waive his right not to be tried again by moving for a new trial. In the first place, the defendant may find it advantageous to wait for the verdict, and if the verdict is unfavorable seek a new trial by appealing. Also, difficult problems would be presented where there is more than one defendant, but only one moves for a new trial. Finally, the Government contends, the "waiver" doctrine is an unsatisfactory way of dealing with the problem, since "the result would be to force the defendant to choose either to accept an unfair trial or 'consent' to a second trial—i.e., to sacrifice his purported constitutional right not to be tried again as the price of preserving his admitted constitutional right to a fair trial." (p. 40).

To avoid these conceptual and practical difficulties, the Government argues, it is necessary to hold that the right to declare a mistrial is part of the trial judge's power to assure a fair trial, and does not require a motion by the defendant. Even if that power is exercised erroneously, the Government says, there should be no bar to a second trial unless a second trial would constitute "oppressive action." In that circumstance, but only in that circumstance, the mistrial should be considered the "equivalent" of an acquittal.

In short, the Government argues in *Gori* that trial judges have the power to terminate a trial when they conclude, correctly or incorrectly, that the prosecution has engaged in misconduct of a sort which would make continuation of the trial unfair. Thus, the trial judge could—as he did in *Gori*—order the defendants to be tried again. If the defendant objects, as he did in *Gori*, that this is double jeopardy, that objection should be sustained or denied on the basis of whether the second trial would constitute "oppressive action."

It follows from this argument that when a judge observes what he considers to be misconduct by the prosecution, he must determine whether such misconduct is of sufficient magnitude to require termination of the trial. If he decides that it is of such magnitude, he must order a mistrial, irrespective of whether or not the defendant has moved therefor.

But what if the judge believes, not only that the misconduct of the prosecution has been so serious that the trial should not be permitted to continue, but that in view of all the circumstances of the case it would be "oppressive action" to subject the defendant to another trial? The necessary implication of the Government's argument is that in those circumstances the judge has the power to grant a judgment of acquittal, since to subject a defendant to the oppressive action of a second trial would violate his constitutional protection against double jeopardy, and to continue the first trial would violate his right to due process.

That, of course, is precisely what happened in this case. The trial judge found that the prosecutor had engaged in serious misconduct which made continuation of the trial impossible. The correctness of this determination, according to the Government's own argument in *Gori*, cannot be challenged. In the present case, unlike *Gori*, the judge concluded that the circumstances of the case warranted an acquittal. Plainly, if the Government's argument in *Gori* is

correct, he had the power to make that decision. Yet, once that power is established, there is no further dispute in the present case. The sole question here is whether the trial judge had the power to grant an acquittal. Thus, if the Government's position in *Gori* is sustained, the decision of the Court of Appeals in the present case must be reversed.

We wish to make one final observation. While even the Government concedes that an appellate court cannot review the propriety of a judgment of acquittal once it is established that the trial judge had the power to grant it, it is noteworthy that under the criterion suggested by the Government in *Gori*, the trial judge in the present case had no choice, if he believed that the prosecutor had engaged in misconduct, but to enter an acquittal.

As we pointed out in our petition for certiorari, the trial in this case had been going very well indeed from the point of view of the defendants. The prosecution's witnesses had evidenced considerable confusion, uncertainty, and general unreliability, and the trial judge had plainly indicated that if the jury brought in a verdict of guilty, he would probably set it aside. (Tr. 377) Thus, it is highly probable that the defendants would have been acquitted, either by the judge or by the jury, had the trial been permitted to continue. At the very least, it is clear that the judge would not have permitted them to be convicted. The judge, however, decided that in view of the unreliability of the Government's witnesses and what he believed to be the misconduct of the prosecutor, he could not permit the trial to continue. The Court of Appeals suggested that the appropriate action at that point would have been a mistrial. But if the argument of the Government in *Gori* is correct, even if the judge had granted a mistrial, the defendants could not have been tried again. For surely, to terminate a trial which was going as well as this one was, and then to require the defendants to be tried again, thereby giving the prosecutor a new chance,

would constitute precisely the kind of "oppressive action" which the Government in *Gori* concedes would be unconstitutional.

Respectfully submitted,

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